

Before the

**SUBCOMMITTEE ON HIGHWAYS, TRANSIT AND PIPELINES
OF THE
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
UNITED STATES HOUSE OF REPRESENTATIVES**

Statement of

**DANIEL E. ENGLAND, CEO
C.R. ENGLAND, INC.
SALT LAKE CITY, UTAH**

Representing

THE AMERICAN TRUCKING ASSOCIATIONS, INC.

On

The Background Check Process for Truckers' Hazmat Endorsements

May 11, 2005



Driving Trucking's Success

**2200 Mill Road
Alexandria, VA 22314
703-838-1996**

Mr. Chairman and members of the committee, thank you for inviting me to testify today on behalf of American Trucking Associations, Inc. (“ATA”) on the subject of the Transportation Security Administration’s (“TSA”) implementation of the background check for drivers seeking hazardous materials endorsements to their commercial drivers licenses (“CDL”). My name is Dan England. I am CEO of C.R. England, Inc., headquartered in Salt Lake City, Utah, a truckload carrier and broker with approximately 2,600 power units and 4,200 employees and independent contractors operating nationwide. I am here on behalf of ATA, a federation of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the trucking industry. ATA’s membership includes more than 2,000 trucking companies and industry suppliers of equipment and services. Directly and through its affiliated organizations, ATA encompasses over 34,000 companies and every type and class of motor carrier operation. The trucking industry hauls nearly 70% of all the domestic freight transportation tonnage in the U.S. on an annual basis, equating to 9.8 billion tons.

Overview:

The trucking industry has long been actively engaged in promoting security. It is in our interest from both a customer relations perspective and a financial bottom line perspective. Since the tragic events of September 11, 2001, we now also realize it is in our interest from a homeland security perspective.

Prior to September 11, all carriers utilized various methods to screen their drivers. A large number of carriers utilized third party vendors to conduct criminal history record checks on their drivers. However, these checks were often limited in geographic scope due to cost constraints resulting from a lack of access to the Federal Bureau of Investigation’s (“FBI”) nationwide databases. When Congress enacted the security threat assessment requirement for hazardous materials endorsed drivers in October 2001 as part of the USA PATRIOT Act, the trucking industry was encouraged that a sensible approach to security screening of drivers would be implemented. Unfortunately, as this testimony demonstrates, TSA has not done so.

ATA believes that the primary objective of the background check we are discussing today is to prevent a terrorist from legitimately gaining access to a load of hazardous materials for the purpose of doing harm. *The trucking industry unequivocally supports that objective.* However, where ATA differs from those at TSA responsible for implementing the background check program is that ATA believes the objective can be accomplished through means that do not unnecessarily discourage drivers from hauling hazardous materials by virtue of inconvenient processes and inflated costs. We must all keep in mind that a hazardous materials endorsement is required to haul such innocuous (from a weapons standpoint) and routinely used products as paint and nail polish.¹

Since January 31, the trucking industry has borne the monetary and non-monetary costs of the missteps associated with the implementation of the fingerprint-based background check

¹ For scheduling and logistics purposes, a number of carriers require all their drivers to have hazardous materials endorsements. ATA estimates that there are 3.2 million active CDL holders, and TSA estimates that this background check requirement will affect 2.7 million of these holders, equaling roughly 84% of the active driver population.

requirement for new applicants – a relatively small population. On May 31, the requirement will go into effect for drivers seeking renewals and transfers. Thus, it will affect drivers who have been hauling hazardous materials loads for, in some cases, over 30 years. This is a significantly larger population (TSA estimated roughly 2.7 million drivers). TSA's inability to smoothly handle background checks for the small population of new applicants is hardly reassuring that it will be able to handle an estimated 45,000 renewals monthly. This program needs immediate attention.

Consistent with the security objective, ATA proposes Congress direct TSA to perform name-based checks of drivers until such time as a nationwide, coordinated transportation-wide security credentialing program is put in place. As discussed further below, this approach will continue to ensure that terrorists do not obtain hazardous materials endorsements. It will also allow the trucking industry to tie into a coordinated program that, if implemented properly, could minimize costs, reduce driver inconvenience, and eliminate duplicative and redundant background checks of drivers and/or other transportation workers. Ultimately, this solution will greatly improve the trucking industry's ability to haul the products that are vital to this Nation's economy in a secure and safe manner.

TSA made a number of bad decisions in implementing Congress's mandate.

With enactment of the PATRIOT Act, ATA began thinking about ways to implement a system to achieve the security objective in an efficient and convenient manner that would provide the least disruption to the trucking industry and its workforce as possible. Over the extended course of time it has taken TSA to implement the background check program, ATA shared with TSA its thoughts and ideas on how the security threat assessment should work. Throughout, ATA conveyed the following key points: 1) the process should be uniform nationwide; 2) the process should be convenient for drivers; and 3) carriers should be notified of the ultimate disposition regarding their drivers. Unfortunately, I appear here today before this Committee dealing with a process that is 1) not uniform; 2) inconvenient for drivers; and 3) one in which carriers are not required to be notified of their drivers' security status. If all these negatives were in return for heightened security, it may have been more palatable to the trucking industry. Regrettably, the added costs and driver inconvenience associated with TSA's deployment of the fingerprint-based check do not seem to be justified by a commensurate increase in security.

The PATRIOT Act requires a check of the following: a) the relevant criminal history data bases; b) in the case of an alien, a check of the relevant data bases to determine that alien's immigration status; and c) as appropriate, a check of relevant international data bases. In implementing the statute through regulations, TSA chose to initially commence name-based checks on May 5, 2003 and commence with fingerprint-based checks on November 1, 2003. After several delays, it is our understanding that the name-based checks were not commenced until mid-2004. The fingerprint-based checks commenced on January 31, 2005 for new applicants and will commence on May 31, 2005 for current holders of hazardous materials endorsements seeking to renew or transfer their endorsements. Nothing in the PATRIOT Act requires a fingerprint-based check.

Early in the process, it became evident that TSA was more interested in the views of the states than the real regulated community – carriers and drivers. We can only presume it is because the states issue hazardous materials endorsements. The trucking industry has always viewed the CDL and the hazardous materials endorsement as *safety* documents – they certify that a driver has the knowledge and skills to *safely* transport hazardous materials. The background check requirement is a security program created by a federal statute and implemented by federal regulation. It can, and should, be done separate and apart from the CDL program. Regardless, the states implement the CDL program pursuant to federal rules. Therefore, TSA's failure to assert more control over the program to make it uniform is inexcusable.

TSA ultimately decided to use a contractor to assist with implementation of this background check program. While it insisted on the January 31, 2005 start date, TSA did not finally award the contract until October 2004. TSA then chose to give each state until December 24, 2004 to decide whether the state wanted to utilize the TSA contractor for fingerprint and information collection or not. Therefore, it was not until Christmas Day (roughly a month before implementation began) that the contractor knew in which states it had to set up fingerprint collection capabilities. As could be expected, there were, and continue to be, more than a few hiccups.

TSA's implementation has created, and will continue to create, numerous problems for the trucking industry.

I would like to highlight just a few of the problems the industry faced early on and then some of the problems we in the trucking industry continue to face. The end result of these problems is that it reduces our industry's ability to transport the freight that is crucial to our economy's continued strength and growth.

- From a State of Illinois official dealing with CDLs who surveyed fellow CDL officials: As of March 4 (a month after the requirement had gone into effect for new entrants): Illinois had submitted 644 fingerprint requests and received 0 responses from TSA in return; New York had submitted 350 fingerprint requests and received back 0 responses in return; Vermont had submitted 10 fingerprint requests and received back 0 responses in return; Iowa had submitted 138 fingerprint requests and received back 0 responses in return; Mississippi had submitted 100 fingerprint requests and received back 0 responses in return; Kansas had submitted 150 fingerprint requests and received back 40 responses in return; and Florida had submitted 700 fingerprint requests and received back 14 responses in return.
- From a DMV official in Virginia as of March 10: Virginia was not receiving confirmation from TSA that prints had been received and no approvals. In fact, as of March 10, TSA was still giving instructions to Virginia on how to fix the communications process.
- Several states were implementing the federal regulation unevenly, highlighting the problem with lack of uniformity. Although the fingerprint requirement for renewals and

transfers does not take effect until May 31, several states were stripping the hazmat endorsement from drivers who moved from one state to another, thus making them ineligible to haul hazardous materials loads until TSA processed the results of their background checks. Since a large number of carriers require drivers to have hazardous materials endorsements as a condition of work, these workers are eventually unable to work for a period of time.

Admittedly, some, but not all, of the problems cited above have since been addressed, but it is unconscionable that these problems were allowed to detrimentally affect drivers' livelihoods and carriers' business for months after the program went into effect. Notably, these problems arose from implementation for new applicants, who are a mere fraction of the population that will be affected beginning on May 31. One can only suppose that the trucking industry has witnessed only a mere fraction of the problems to come.

There are problems that the trucking industry still faces today that do not appear likely to be corrected in advance of May 31. In its analysis of its regulation, TSA estimated that there would be a 20% reduction in the number of drivers with hazardous materials endorsements. If the reduction is a result of individuals who are identified as threats being excluded from the transport of hazardous materials, then so be it. However, ATA cannot stand idly by if the reduction is attributable to a poorly designed process that dissuades drivers from seeking or renewing their hazardous materials endorsements. At a time of driver shortage, I would argue that the Nation's economy cannot afford this process to continue.

Inconvenient and Inadequate Locations: Universally, drivers and carriers in the states that elected to use the TSA contractor are very concerned about the lack of an adequate number of approved fingerprint submission sites. In those 34 states plus the District of Columbia, there are a total of 91 sites where drivers can submit fingerprints for the hazmat background check process (as of May 6). In many large states, there are only two locations (some states, like Connecticut, Delaware and Maine only have one), which results in long travel times for drivers. For example, in North Dakota, some carriers' drivers are more than 200 miles away from an approved collection site. Six hour roundtrip commutes to and from the collection site are common in many states. The time spent getting to and from a fingerprint location translates into lost wages for the driver and lost productivity for the carrier. This is simply unacceptable!

Adding to the inconvenience for the drivers is the limited hours of operation for many sites. Some drivers in Michigan had 10 hour roundtrips to Michigan's sole initial location. Since then, Michigan has added two more locations (Saginaw and Lansing), but they only accept prints on Monday from 2 pm – 6 pm and Tuesday and Thursday from 2 pm – 6 pm, respectively. Nebraska added a second location that only accepts prints on Monday and Wednesday from 2 pm – 6 pm. Finally, a number of these locations are at office buildings with no adequate parking facilities for trucks. The design of this system certainly tests a driver's incentive to seek a hazardous materials endorsement.

Turn-Around Time: Additionally, the turn-around times from fingerprint submission to driver receipt of notification from TSA varies greatly among the states. In an informal survey of carriers doing business throughout the country, ATA found that the turn-around time ranges from

two weeks to 120 days. 120 days is clearly too long. In the case of renewals, it would likely lead to expiration of the original hazardous materials endorsement, since state licensing agencies are required to send out notices of the screening requirement to drivers only 60 days in advance of expiration. TSA believes it resolved this problem by allowing states to temporarily extend the expiration date, but a number of states have noted that they do not have the legislative authority to do so. This variation in turn-around times, and the unacceptable lengthy turn-around times, can be attributed to the lack of a uniform, nationwide program.

The costs of the hazardous materials background check program are unnecessarily high.

In the states that opted to use the TSA contractor for fingerprint and information collection, the fee is \$94 broken down as follows: \$38 for the Information Collection fee (i.e., fingerprint capture); \$22 for the FBI fee (this fee is \$24 if the state elects to capture fingerprints itself); and \$34 for the Threat Assessment fee. The 17 states that opted to collect prints on their own must still charge the \$24 FBI fee and the \$34 Threat Assessment fee, but they are free to charge whatever they like for the information collection portion. Some states are charging significantly more. For example, New York charges \$75 for information collection. TSA admitted in its rulemaking that if all the states had participated in the program, the information collection fee would have been significantly lower (TSA had estimated closer to \$25). Nothing in the statute required a decentralized approach. Now, however, the industry is paying more than necessary for this approach.

Unfortunately, these costs represent the tip of the iceberg. As noted earlier, there are significant costs to the driver associated with taking a day off work in order to travel to submit fingerprints. There are fuel costs associated with going to and from the collection site. The program implementation has negatively affected driver training and hiring programs. For new entrants, it used to be routine for drivers to go to a truck driving school and be eligible for hire and work by the time they graduated. With the new requirement, states do not allow new applicants to begin the background check until they have already obtained their CDL, meaning a new entrant cannot have his/her hazardous materials endorsement by the time they graduate from truck driving school. This usually means they are not very useful or attractive to a carrier that hauls hazardous materials. **There are better ways to accomplish the background check, but nobody seems willing to entertain them.**

The disparity in costs of other transportation-related background check programs makes the implementation of the hazardous materials background check program particularly difficult for the industry to swallow. For example, a worker at an airport seeking a badge for unescorted access to secure areas generally pays under \$50 and submits his/her prints at his/her place of work. That seems pretty convenient when compared to what the truck driver must endure. Further, a driver seeking certification under the Northern Border Free and Secure Trade ("FAST") program undergoes a background check that involves review of the criminal and immigration databases in Canada and the United States. Presently, the total fee for the FAST driver application is \$50, which includes the issuance of a FAST card with radio frequency identification tag. Again, the hazardous materials background check is \$94 in TSA contractor states and that does not include the cost of the actual credential.

Finally, ATA is deeply troubled by the thinly veiled admission by TSA that the trucking industry is bearing the costs of establishing a system that will be used by applicants from other modes of transportation in the future but at significantly lower costs. In TSA's Air Cargo Rule, which would broaden the background check requirements for certain aviation workers to include screeners and supervisors of screeners of cargo to be carried aboard all-cargo aircraft and which TSA proposed on the same day that it proposed the fees for the hazardous materials background check program, TSA stated:

[W]here possible, TSA would leverage existing processes, infrastructure and personnel that are envisioned to be in place for other Security Threat Assessment programs at the time this program begins operation. Existing infrastructure that would be leveraged include the HAZMAT Endorsement Program's Hazardous Materials Endorsement Screening Gateway System (HMESG); however, some modifications to these systems would be necessary to meet the proposed requirements. The changes would include connectivity with additional government agencies, software enhancement and additional backup capabilities.²

TSA then estimated that total start up costs for the above air cargo system would be \$690,000, compared to total start up costs of \$4,760,000 for the HMESG, a differential of more than \$4 million. As discussed further herein, ATA supports the concept of government agencies leveraging resources to implement the requirements for security threat assessments more efficiently. In fact, the coordinated, nationwide, transportation-wide system that ATA could support would do just that. In this instance, however, it is unconscionable to require the trucking industry to bear the burden of what amounts to a subsidy for other transportation sector workers.

Has commencement of fingerprint-based checks contributed to enhanced security in a cost-effective manner?

TSA's uneven application of security requirements across the transportation sector calls into question the need for the current fingerprint-based background check program that is so costly and inconvenient to drivers. In the same Air Cargo Rule which was cited earlier, TSA proposed to require individuals who have unescorted access to air cargo but had not undergone the background check required for Secure Identification Display Areas ("SIDA") access (i.e., secure areas of an airport) "to undergo a security threat to verify that they do not pose a security threat."³

In that rule, TSA proposed that such individuals should only be subjected to a name-based background check. Part of its rationale included:

TSA recognizes that the number of individuals with access to cargo is large—approximately 63,000—and that the companies they work for run the gamut from complex organizations to "mom and pops." Therefore, requiring all these individuals to undergo fingerprint-based criminal history background checks would be a time-consuming and costly process. TSA believes that potential security concerns related to unescorted access to cargo by these individuals would be best addressed by requiring individuals to submit to a Security Threat Assessment program, focused on the threat of terrorism. A Security Threat Assessment, as proposed in this NPRM, would rely on checks of existing intelligence-based records and databases to ensure that an individual who is a known or suspected threat is prohibited from working in positions that could

² 69 Fed. Reg. 65258, 65276 (November 10, 2004).

³ 69 Fed. Reg. at 65265.

allow that individual to have unescorted access to air cargo. This program adopts best practices from the financial services and transportation security communities to reduce the likelihood that a terrorist could gain access to cargo.⁴

Applying that rationale to the trucking industry, how TSA ended up with the process that the trucking industry now faces is inexplicable. The affected trucking industry population is large—approximately 2.7 million by TSA’s numbers—and trucking companies certainly run the gamut from complex organizations to “mom and pops.” The period of time since January 31 has certainly shown that the fingerprint-based records check process designed by TSA is both time-consuming and costly. And in the end, a hazardous materials endorsement essentially allows an individual unescorted access to cargo. A number of hazardous materials are sent by air on all-cargo aircraft. Consistent rationale points to the conclusion that name-based checks should suffice – at least until such time as a system is established that is less time-consuming and less costly.

TSA itself has recognized the adequacy of name-based checks against terrorist databases on a number of occasions. In the April 6, 2004 Federal Register, TSA stated, with respect to checking terrorist-related databases, “TSA believes that this name-based check of all drivers who are currently authorized to transport hazmat will enable the agency to focus on individuals who may pose a more immediate threat of terrorist or other dangerous activity.” TSA further stated, “The terrorist-related information that TSA will search prior to January 2005, is the best indication of an individual’s predisposition to commit or conspire to commit terrorist attacks.” Finally, TSA concluded that the process of first searching terrorist-related databases and then searching criminal databases that include outstanding wants and warrants and immigration records is consistent with the USA PATRIOT Act. Later, in a November 10, 2004 Docket Exemption Notice, TSA stated, “Moreover, TSA has completed a name-based threat assessment of all current HME holders and repeats this check periodically. TSA has disqualified the individuals TSA has concluded pose or may pose a security threat. Therefore, TSA has determined that delaying [fingerprint-based checks] for individuals who currently hold an HME and must renew or transfer them within the next several months will not adversely impact security.”

If a check of the terrorist and immigration databases alone is insufficient, a name-based check of criminal history records is also possible. Name-based checks are conducted in compliance with the Brady Act for gun purchases and by Customs and Border Protection officials for customs and immigration purposes every day. Again, the trucking industry asks if the costs and burdens justify the fingerprint requirement.

ATA is not aware of anything magical about either January 31 or May 31 for commencing fingerprint-based checks. There have been a number of delays associated with this program, but it seems that TSA was convinced that conducting name-based checks was satisfactorily addressing the real threat. The arbitrariness of starting on these dates (when TSA and the states clearly are not ready) is underscored by the actions of states like Minnesota and Pennsylvania. Minnesota provided a period of time where drivers could come in and pay a fee and extend their hazardous materials endorsements to 2009. Pennsylvania, on the other hand, was suggesting that drivers come in and get their hazardous materials endorsement renewed prior to May 31 to avoid

⁴ 69 Fed. Reg. at 65265.

the burdens associated with the fingerprint process. The TSA rule allows this, which again indicates that TSA believed their name-based check of current holders was a significant and sufficient security screen. ATA agrees and urges that the name-based check be continued periodically in lieu of the fingerprint-based process.

I must bring to your attention what appears to be a glaring lapse in the TSA regulation from a security standpoint. The motor carrier for whom the driver is driving is not informed as to whether TSA has ultimately determined the driver to be a security threat or not. As mentioned earlier, ATA has raised this issue repeatedly with TSA, yet TSA did not include a notification requirement. Practically speaking, what does this mean? At my company, we note when a driver's hazardous materials endorsement is set to expire. We also conduct the required motor vehicle records search. However, in the case of an existing driver, the driver will presumably initiate the renewal process well in advance of expiration. If the driver is in a state that allows renewal six months in advance, and the driver initiates the background check that far in advance, and TSA notifies the driver a month later that the driver is a security threat and ineligible to haul hazardous materials, how would I as a carrier find out? Thus, the driver would have the remaining five months (which is when my company's records would indicate a need to check to see the endorsement has been renewed) to drive for my company. Since the driver has been deemed a security risk, this type of situation would place my company in jeopardy. This must be resolved to allow carriers to be part of the solution of ensuring secure drivers.

There is a better way to screen drivers seeking hazardous materials endorsements.

As this testimony has stressed throughout, there is no need to subject the trucking industry to the burdensome fingerprint-based process concocted by TSA to achieve Congress's security objective – I remind you, an objective shared by the industry. The solution is to continue to conduct name-based checks of drivers and design and put in place a proper a nationwide, coordinated transportation-wide security credentialing program for access to secure areas or hazardous materials. The fact that TSA has implemented a hazardous materials background check program that is clearly broken should not encourage Congress or TSA to fix it.

Truck drivers go everywhere and connect the various legs of cargo transport. Therefore, drivers are subject to SIDA checks if they do business at the airports. They will be subject to background checks if they do business at maritime ports pursuant to the requirements of the Maritime Transportation Security Act. If the driver crosses the border, the driver may undergo a background check as part of the FAST program. If the driver hauls arms or ammunition for the Department of Defense, the driver is subject to a background check. The same is true if the driver hauls cargo for the U.S. Postal Service. Additionally, states and localities are beginning to layer their own background check requirements that will affect truck drivers. **A coordinated, nationwide system that preempts state and local background check requirements for those involved in interstate commerce is desperately needed. It makes no sense for the same driver to be checked against the same databases multiple times for different background check programs.**

The Transportation Worker Identification Credential was originally intended to be the type of program that ATA requests. However, some of the key elements noted in the paragraph above

need to be incorporated into the program. When such a program is in place, the costs will be shared over a larger population and thus lower for everybody. And if fingerprints are to be part of the program (as they seem to be), then at least a more robust nationwide fingerprint collection network could be established to ease the burden and inconvenience on truck drivers. This program will assist in securing the trucking industry without crippling it.

Conclusion

Mr. Chairman and members of the committee, on behalf of ATA, I thank you for giving me the opportunity to appear here to discuss these critically important issues. The industry stands willing to be a supportive partner in the effort to secure our homeland. However, as the primary transporters of commerce, we also have a responsibility to the economic security of our Nation. Unfortunately, the industry now faces a background check program that enhances the trucking industry's security by reducing the trucking industry's ability to transport those every day hazardous materials upon which this Nation's economy depends. As my testimony today has shown, it does not have to be a zero-sum game. Working together, we can enhance security while preserving the ability to transport goods. The industry looks forward to working with Congress, and the new leadership at the Department of Homeland Security and TSA, to make this happen.